United States Department of State

The Legal Adviser

Washington, D.C. 20520

February 10, 1986

Executive Registry
86- 0500X/1

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: ABA Free Flow Proposal

Your memorandum of February 4 has led me to devise what I believe is a satisfactory way to deal with the ABA proposal.

First, we have no intention of supporting any specific ABA proposal to modify 8 U.S.C. § 1182 (a) (28). Rather, I will propose to the Secretary that we simply support in principle Recommendation 103 (Tab A), which was specifically revised to address concerns we had expressed over the past several years about previous versions. In doing this, we would make a statement to protect our position. Tab B.

Second, we fully agree that support for the revised Recommendation must not be understood to imply support for any legislative change that might diminish existing Executive Branch powers to exclude aliens who we believe pose a threat to important national interests. In this connection, I have prepared a draft Administration bill (Tab C) that we will circulate to Justice (including INS and the FBI) and the Agency for consideration.

Am I correct in assuming that, with the precautions I have described, we have resolved the concerns that you expressed in your February 4 memorandum? (Bill Casey has already agreed to our proposal, and I am awaiting word from Ed Meese, whose views I will convey to you as soon as I receive them.)

Abraham D. Sofaer

Attachments:

Tab A - Recommendation 103
Tab B - Draft Statement
Tab C - Draft Administration Bill

cc: The Attorney General
Director of Central Intelligence

A

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

American Bar Association

February 1, 1986

Dear Members of the House of Delegates and Board of Governors:

This is to urge your support for the enclosed revised version of Recommendation #103, sponsored by our section and, as of today, the ABA Standing Committee on Law and National Security, when it is considered at the upcoming Midyear Meeting by the ABA House of Delegates and Board of Governors. After one and one-half years of extensive consultations with the U.S. Department of State and other interested ABA and governmental entities, this revised recommendation and report have been substantially clarified and redrafted since their original submission to the House and Board. The recommendation is consistent with numerous previous policies adopted by the House, as well as with recent statements by President Reagan and Secretary of State Shultz, and with our Nation's obligations pursuant to the Helsinki Final Act.

As revised, the recommendation urges that United States law concerning visa denials conform to current practice as described by the State Department by codifying the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their past or present political beliefs or associations. In so doing, it strikes an important balance between preserving the ability of our Government to deny visas to terrorists and others who threaten the national security or foreign policy interests of our country while at the same time removing an anachronistic statutory provision promulgated during the McCarthy Era (as part of the McCarran-Walter Act) so that visits to the United States by foreign speakers are facilitated when not harmful to our national interests.

This enclosed revised version deletes parts I(b) and 2 of Resolution #103 in the bound volume of reports pending before the House. Numerous caveats and exceptions also have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States, seeking reciprocity for the entry of Americans into other countries, or denying entry to aliens during wartime, a national emergency or pursuant to a Presidential proclamation.

Please do not hesitate to contact us, our Section Delegate to the House, Martha W. Barnett, or our Section Liaison to the Board, Samuel S. Smith, if you would like to discuss this matter further. Thank you for your consideration.

Sincerely,

Abner J. Mikva
Chairperson

Philip A. Lacovara
Vice-Chairperson and
Member of the House

Enclosure
0392j

SECTION OF INDIVIDUAL RIGHTS

1800 M STREET NW WASHINGTON, DC 20036 • (202) 331-2279

REPORT

"Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it." [President Ronald Reagan, January 17, 1984] 1/

"We will never deny physical access to anyone because of the beliefs he or she may espouse." [U.S. Secretary of State George Shultz, January 12, 1986] 2/

"The participating states . . . make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states . . .

* * * *

The participating states . . . make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information with other countries . . . " [Helsinki Final Act of 1975] 3/

"The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [Supreme Court in New York Times v. Sullivan] 4/

After extensive consultation with interested ABA and governmental entities, this recommendation and report have been substantially clarified and redrafted since their original submission to the ABA House of Delegates in August, 1984. The adoption of this principle would call for a conforming of existing law to current practice as described by the Administration. The resulting statutory change would reflect our Nation's commitment to a free exchange of ideas. It would leave the Government free to continue to deny visas, as it does now, when it believes that granting the visa would lead to harm to the interests of the Nation, including its foreign policy

interests. The appropriate role, if any, of judicial review of visa denials is not addressed by the recommendation.

This recommendation makes it clear that the intent is to preserve the ability of our Government to combat terrorism and otherwise protect the national security and other interests of the United States by denying visas when the interests of the United States, including foreign policy interests, are affected. Numerous caveats and exceptions have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States.

The recommendation at the same time strikes a balance in the interest of preserving the rule of law by urging the removal of an anachronistic statutory provision so that visits to the United States by foreign speakers is facilitated when not harmful to our national interests. The recommendation is also consistent with numerous previous policies adopted by the ABA House of Delegates 5/.

This revised report has also been redrafted to make it absolutely clear that it is not meant to imply any criticism of the Administration, the U.S. Department of State or other governmental entities. In fact, this principle is consistent with current practice as described by representatives of the Administration to congressional committees and to our Section, and with Secretary of State Shultz's recent statement to the PEN conference quoted above. Indeed, this recommendation seeks to preserve as much as possible of our constitutional tradition of permitting our citizens access to information and ideas brought to our shores by citizens of other countries, except where such visits would harm our national interest. This American tradition of generally permitting travel and the exchange of information and ideas across the American border has historically distinguished our society from totalitarian governments.

As President Reagan observed in 1984 and as our Nation observed when it became a signatory to the Helsinki Final Act in 1975, a free exchange of information and ideas -- subject to narrowly defined exceptions to protect certain national interests -- is crucial to the health of our democratic society. Through open and robust debate in the "marketplace of ideas," American citizens inform themselves of policy choices which shape and affect their lives. The flow of persons in and out of the United States is an important part of this exchange.

The problem which this resolution addresses is that current United States law, on its face, provides for the denial of visas to persons solely because of certain political beliefs or current or past memberships or associations. Accordingly, the recommendation would require eliminating the

narrow ideological remnants of the McCarthy era, while permitting the exclusion of aliens whose activities endanger the welfare, safety, security or foreign policy interests of the United States. This principle would safeguard the American public's right to receive ideas from abroad by eliminating barriers to unpopular foreign political beliefs and philosophies, and would support our declared intentions under the Helsinki Final Act. It would permit the continued exclusion of terrorists and others who seek entry to engage in illegal activity or other activity detrimental to American security or whose entry or presence in the United States would be detrimental to the national interest.

Nothing in this recommendation would disturb the provisions of the Immigration and Nationality Act[6] which provide clear and necessary authority to exclude aliens who are believed to be coming to the United States to "engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, [or] public disorder, or in other activity subversive to the national security."[7] The recommendation also leaves undisturbed that portion of the Act which permits the exclusion of those persons who would come to the United States to engage in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[8] Furthermore, this recommendation would leave intact that portion of the Act providing that:

> "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." [9]

None of these provisions would be disturbed by the proposed standard.

What would be directly affected by the proposed standard is the so-called "ideological exclusion" provision of the Act. Under this anachronistic statutory provision, promulgated under the McCarran-Walter Act during the infamous McCarthy era and its attendant hysteria, an alien is ineligible to receive a visa to enter the United States whenever, among other grounds, a consular officer or the Attorney General has reason to believe that the alien is an anarchist, a member of a communist or totalitarian party, advocates the doctrines of world communism or the establishment of a totalitarian dictatorship, or belongs to or is affiliated with an organization that publishes or distributes materials espousing such doctrines.[10] This provision of the law does not require a finding that the alien's admission,

presence in the United States or activities in the United States would cause injury. The simple fact that an alien holds -- or once held -- any of the enumerated beliefs or belongs or once belonged to a proscribed organization requires exclusion unless a waiver is granted.

These provisions apply to foreign nationals who seek permanent residency, as well as those who wish to enter the United States for short, temporary visits. According to the Immigration and Naturalization Service, 8,000 people from 98 countries are currently restricted from entering this country because of their political beliefs or associations. In 1983, approximately 700 persons were excluded under Sec. 212(a)(28).11/ Others simply refuse to apply or to provide information about their political activities.

The McCarran-Walter Act damages our reputation in the world by appearing to suggest a fear of ideas and exclusion of individuals solely because of their beliefs. The American public is also denied access to non-political scholarly and cultural presentations when foreign artists and writers decline to apply for a waiver or receive permission to enter the country too late to engage in planned activities.

In 1977, Congress passed an amendment to the McCarran Act with the specific full purpose of achieving greater compliance with the Helsinki Act's basic principle of freedom of international travel.12/ The amendment addresses visa denials based on that section of the Act which denies visas to aliens who are affiliated with a communist or totalitarian party, or a related organization.13/ Under the amendment, the Secretary of State must recommend a waiver to the Attorney General to permit such aliens to enter the United States unless the Secretary of State finds and so certifies to both Houses of Congress that the alien's admission "would be contrary to the security interests of the United States."14/ However, the effect of this amendment has not been as extensive as some thought it would be. Although it has removed some of the admission barriers, it applies on its face only to the exclusion provisions relating to membership and not to those related to beliefs.

The proposed standard would require -- subject to the enumerated exceptions -- that Section 212(a)(28) not apply to visitors seeking entry into the United States for the purpose of meeting with Americans. The result would be that the Government would be neither required nor permitted to exclude aliens seeking to visit the United States based simply on their current or past political associations or beliefs. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28). (Since the principle applies only to visitors coming to the United States at the invitation of Americans it would not apply to applications for permanent resident status; they could still be denied on the basis of political beliefs or associations.)

The standard would simply shift the presumption. It makes it clear that this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the Government believes they intend to engage would harm the interests of the United States, including foreign policy interests. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation nor of the Government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

In testimony before the House Judiciary Subcommittee on Immigration and in a letter by the Legal Adviser of the State Department commenting on an earlier draft of this report, the current Administration has, while not endorsing repeal of Section 28, indicated that its primary concern would be satisfied if it maintained the right to exclude aliens if their visit to the United States would cause injury to the foreign policy or other interests of the United States.15/ The proposed standard would not in any way limit this authority. Furthermore, in adopting this principle, the ABA would not be taking any position on whether judicial review of visa denials is appropriate, and if so, under what circumstances.

CONCLUSION

This recommendation recognizes the crucial importance of preserving the ability of our Government to protect our national security, safety, and welfare, while at the same time advocating a limited revision of law to codify the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their political beliefs. Removing this anachronistic provision of the McCarran-Walter Act would strengthen our constitutional system by ensuring Americans access to foreign ideas and people, making possible a more fully informed and politically sophisticated citizenry.

Respectfully submitted,

Abner J. Mikva, Chairperson
Section of Individual Rights
and Responsibilities

John Norton Moore, Chairman
Standing Committee on Law and
National Security

February, 1986

FOOTNOTES

#1- New York Times, Jan. 17, 1984, at A.8.

#2- New York Times, Jan. 13, 1986, at A.1

#3- Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. In order to implement these commitments in the section on "Co-operation in Humanitarian and Other Fields," the Final Act contains a number of specific commitments to facilitate the movement of people and information. See "Inhibiting Public Debate: U.S. Violations of the Helsinki Accords," A Helsinki Watch Report, May 1984.

#4- New York Times v. Sullivan, 376 U.S. 254, 270 (1964), quoting Learned Hand in United States v. Associated Press 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

#5- Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

#6- 8 U.S.C. Sec. 1101 et seq. This statute governs the entry of both visitors and immigrants into the United States.

#7- 8 U.S.C. Sec. 1182(a)(29).

#8- 8 U.S.C. Sec. 1182(a)(27).

#9- 8 U.S.C. Sec. 1182(f).

#10- These "ideological exclusions" provisions are contained in 8 U.S.C. Sec. 1182(a)(28).

#11- Letter from Davis R. Robinson, State Department Legal Adviser to Professor John Norton Moore, July 3, 1984. p.2 (Hereinafter State Dept. Letter).

#12- See 22 U.S.C. Sec. 2691(a).

#13- See 8 U.S.C. Sec. 1182(a)(28).

#14- 22 U.S.C. Sec. 2691(a). The McGovern Amendment supplements a waiver procedure previously existing in the law. When the McCarran Act was initially enacted, Congress recognized that cases might arise where extenuating circumstances justified the temporary admission of otherwise inadmissible aliens under the statute. Thus, under the Act, a consular officer or the Secretary of State has discretionary authority to recommend that an alien's ineligibility to receive a visa be waived, and the Attorney General has the discretionary authority to grant the waiver. 8 U.S.C. Sec. 1182(d)(3).

#15- State Department Letter, p.4.

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General Information Form
To Be Appended to Reports with Recommendations

No. _____

Submitting Entity Sect. of Individual Rights & Responsibilities
Stndg. Committtee on Law & Nat'l. Security

Submitted By Abner J. Mikva, Chairperson, I.R.&R. Section
John Norton Moore, Chair, St.Cm. on Law & Nat. Sec.

1. Summary of Recommendation(s)

This revised version of Recommendation #103 deletes parts 1(b) and 2 of the original Recommendation #103 now appearing in the current bound volume of recommendations and reports pending before the House.

Revised Recommendation #103 attached hereto recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

2. Approval by Submitting Entity.

The original principles underlying this recommendation were approved by the Council of the Section of Individual Rights and Responsibilities on May 11-12, 1984. The report with recommendations printed in the bound volume of House recommendations (#103) was approved for submission to the House of Delegates by the section council on May 3-4, 1985, in Boston, Massachusetts.

Recommendation #103 (revised) attached hereto was approved by the Executive Committee of the IRR Section and the Council of the Standing Committee of Law and National Security pursuant to telephone polls conducted during January, 1986.

3. Background. (Previous submission to the House or relevant Association position.)

Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

Initially, a resolution (consisting of four statements of principle) was submitted to the House of Delegates for its consideration in August, 1984, but was withdrawn by the I.R.& R. Section at the request of the Standing Committee on Law and National Security and the Section of International Law and Practice to allow time for further study and negotiation. A similar four-part resolution was resubmitted to the House of Delegates for consideration at the February, 1985, meeting. After consultation with other interested entities, the section agreed to withdraw parts 1,2, and 4 and only submit part 3 to the House. The House adopted part 3 at the February, 1985, Midyear Meeting. Resubmission of parts 1 and 2 of the original resolution, amended since August, 1964 to reflect certain concerns of other interested ABA entities and U.S. government agencies, took place at the ABA Annual Meeting in July, 1985, but was again withdrawn to allow further consideration by interested entities.

The attached revised version of report and recommendation #103 was written in January, 1986 in response to further suggestions offered by representatives of the Standing Committee on Law and National Security and the U.S. Department of State. Recommendation #103 as printed in the bound volume of reports to the House was identical to the one submitted to the House in July, 1985.

4. Need for Action at This Meeting

Legislation incorporating the principles in this recommendation was introduced in the 99th Congress in May and November, 1985 (See #5 below). Hearings on the legislation will be held early next year (soon after the Midyear Meeting) in the House Foreign Affairs and Judiciary Committees. The U.S. Congressional Commission on Security and Cooperation in Europe will hold its first hearing on February 6, 1986 concerning the issue of U.S. denial of visas on grounds of political beliefs, ideology or foreign policy reasons. Since the ABA does not now have any policies which would allow it to testify on such legislation, it would be timely for the House of Delegates to act on this matter at the 1986 Midyear Meeting.

5. Status of Legislation. (If applicable)

Congressman Barney Frank (D.- Mass.) introduced his bill regarding visa restrictions (H.R. 2361) on May 6, 1985. This bill has fifty-eight bipartisan co-sponsors, and was referred to the House Judiciary Committee. Congressman Howard Berman (D. Calif.) introduced his bill on the second principle (H.R. 3825) on November 21, 1985. This bill has one co-sponsor (Congressman Frank),

and was referred to the House Committee on Foreign Affairs. Hearings on the legislation are planned for 1986 by both the House Judiciary and Foreign Affairs Committees. In the previous Congress, in the House of Representatives, H.R. 5227, which dealt in part with ideological exclusions, was the subject of a hearing on June 28, 1984, in the House Judiciary Subcommittee on Immigration, Refugees and International Law.

6. Financial Information. (Estimate of funds required, if any.)

None

7. Conflict of Interest (If applicable)

None

8. Referrals

A copy of this revised report and recommendation was sent to each member of the ABA House of Delegates and Board of Governors, as well as to the chairpersons of all ABA sections and divisions and the chairs of the Standing Committees on Law and National Security and World Order Under Law, on January 31, 1986. All members of the Council of the Standing Committee on Law and National Security received a copy of the revised recommendation and report in mid-January, 1986 prior to their being polled on whether to authorize co-sponsorship. In addition, a copy of report with recommendation No. 103 as printed in the bound volume of reports to the House was sent to the chairpersons and staff liaisons of each of the ABA's member sections and divisions, as well as to the chair of the ABA Standing Committee on Law and National Security and Standing Committee on World Order Under Law in December, 1985. A copy of this revised version as well as the original version as it appears in the bound volume have also been sent to the directors for the ABA Division of Communications, Governmental Affairs Group, Public Services Group, and Professional Services Group.

9. Contact Person (Prior to Meeting)

Philip A. Lacovara
1201 Pennsylvania Ave., N.W., Suite 300
Washington, D.C. 20004
(202) 626-6262

10. Contact Person (Who will present the report to the House)

Martha W. Barnett, Section Delegate
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(904) 224-7000

1237j

B

ADMINISTRATION STATEMENT IN SUPPORT OF ABA RECOMMENDATION #103 (REVISED) CONCERNING UNITED STATES VISA POLICY

The Administration supports revised Recommendation #103 in principle. We believe that aliens who are invited to speak or otherwise participate in an exchange of ideas in this country should not be denied nonimmigrant visas solely on the basis of past or current political beliefs or political associations, or on the basis of the expected content their statements here. Recommendation 103 reflects Executive Branch policy, in that we do not exclude nonimmigrant aliens from the United States for purely ideological reasons.

In practice, the so-called McGovern Amendment, 22 U.S.C. § 2691, all but eliminated the concerns to which Recommendation 103 addresses itself, since virtually all nonimmigrant aliens who might otherwise be statutorily ineligible for admission to the United States solely because of their political views or associations currently receive routine waivers of ineligibility. We agree, however, that the waiver process made necessary by § 2691 is offensive to many people, and a sterile and wasteful exercise.

Administration support for the principles stated in Recommendation 103 does, of course, not imply support for any specific revision of 8 U.S.C. § 1182 (a)(28). That section must be revised in a way that would preserve the Executive's existing ability to exclude terrorist and other aliens whose presence we believe would be potentially damaging to important national interests.

C

DRAFT PROPOSED AMENDMENT OF 8 U.S.C. § 1182 (a) (28) TO CONFORM TO THE PRINCIPLE STATED IN ABA RECOMMENDATION #103 (REVISED) WHILE PRESERVING EXECUTIVE BRANCH POWERS TO EXCLUDE ALIENS IN THE NATIONAL INTEREST

8 U.S.C. § 1182 (a) (28) ...

(J) Any alien who is within any of the classes described in subparagraphs (A), (B), (C), (D), and (E) of this paragraph shall not be ineligible to receive a visa, provided such alien is properly classifiable as a nonimmigrant under Section 101 (a) 15. However, the Secretary of State or the Attorney General may in their discretion deny to any alien or class of aliens the benefits of this subsection if they determine that the entry of such alien or class of aliens would be deterimental to the national security.